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IN THE

Supreme Court of the United States

OCTOBER 1963 TERM.

No. 260

HYMEN MILLER, MILDRED MILLER, HIS WIFE, AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE UNDER DOCUMENT No. 16897045,

Appellants,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION TO DISMISS.

JOHN C. MELANIPHY,
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THE SUPREME PRINTING COMPANY, CHICAGO 56

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Appellee in the above-entitled case moves to dismiss on the ground that the question presented is so unsubstantial as not to need further argument.

STATEMENT.

Appellants' Jurisdictional Statement is replete with misstatements of fact.

Although such misstatements throw no light on the constitutional question appellants attempt to raise herein, appellee will not permit this court to be misled thereby.

Appellants state (Jurisdictional Statement, p. 2) that appellee sought "a mandatory injunction to enforce a building ordinance of the City of Chicago (Tr. 3; Abst. 1-9)."

The mandatory injunction sought by appellee was not to enforce "a building ordinance" but was for the purpose of making appellants' building comply with the minimal sanitary, fire and safety requirements of appellee's building code (Tr. 3, Abst. 3.)

Such suit was brought pursuant to a statute of Illinois (Ill. Rev. Stat. 1959, chap. 24, par. 23-70.3, Tr. 3, Abst. 3), which empowers Illinois municipalities to proceed by injunction to make an owner of any building or structure that "fails to conform to the minimum standards of health and safety as set forth in the applicable ordinance of such municipality . . . so to conform."

The evidence herein discloses that a group of appellee's building inspectors on April 25, 1961 (Tr. 3, Abst. 22, 27, 28), found that appellants' building violated appellee's building code in that (1) the walls and partitions separating the dwelling units, the walls and partitions separating the dwelling units from the public corridors, and the doors separating the dwelling units from the public corridors failed to provide proper fire resistance (Tr. 3, Abst. 22-26, 45-52); (2) certain kitchens failed to provide proper ventilation (Tr. 3, Abst. 29); (3) certain bathrooms were not equipped with the required lavatories (Tr. 3, Abst. 27, 28, 29); (4) insufficient number of bathrooms (Tr. 3, Abst. 29, 30); and (5) required vents absent from certain laundry tubs and bathrooms (Tr. 3, Abst. 27, 28).

Appellants not only presented no evidence in the trial court to contradict the foregoing evidence but offered no evidence (Tr. 3, Abst. 66).

Under Statement of The Case (Jurisdictional State-

ment, p. 5), appellants state that an ordinance of appellee required appellee to make an annual inspection of appellants' building. Appellants do not identify such ordinance but indicate that it is shown in Appendix II. Appendix II, p. 23a, shows section 46-2, which is evidently the ordinance referred to.

Such ordinance exempts from an annual inspection "multiple dwellings three stories or less in height." Appellants' building is three stories high and is devoted to multiple dwelling use, having 22 dwelling units (Jurisdictional Statement, p. 7). Therefore appellants' building was not subject to the annual inspection provisions of sections 46-2.

Appellants state (Jurisdictional Statement, p. 5), that defendant Hymen Miller in 1957 went to appellee's building department and was advised by the person in charge "that there were inspection records and that the building was in good order (Tr. 3, Abst. 54-55). In reliance thereon, Miller purchased the building for $40,000 (Tr. 3, Abst. 56)."

Hyman Miller was called as an adverse witness by appellee (Tr. 3, Abst. 53) and never testified that he spoke to the person in charge of appellee's building department. He testified that he could not name or identify the two people in the building department that he talked to (Tr. 3, Abst. 56).

Tr. 3, Abst. 56, does not show that Miller purchased the building on the representation of anyone in appellee's building department. It merely shows that Miller paid $40,000 or $41,000 for the building.

Under Federal Question Is Substantial (Jurisdictional Statement, p. 7), appellants state that the building "has 12 bathrooms and is occupied by 29 persons (Tr. 3, Abst. 29, 31). Thus, there is an average of more than one bath-

room for each 2½ persons. The general requirement, nation-wide, is one bathroom for 10 persons (Tr. 3, Abst. 44)."

Tr. 3, Abst. 31, shows that 7 of appellants' dwelling units each had its own private bathroom and that the other 15 dwelling units shared 5 bathrooms, thus there was only 1 bathroom for each 3 dwelling units; and the number of people using such bathroom depended on the number of people living in such 3 dwelling units. At the rate of 1 person per such dwelling units, the minimum number would be 3 people, but such dwelling units usually contain 2 or more people so that the minimum would be at least 2 per dwelling unit or a minimum of 6 people for each 3 units.

Tr. 3, Abst. 44, shows that Eugene T. Hoban, a doctor in appellee's board of health, testified that nation-wide, generally one bathroom was required for *8 to 10 people.*

The trial court found (Jurisdictional Statement, p. 3a), "That evidence also tends to show that the original construction of the building had been altered without obtaining any permit from the Building Department of the City of Chicago, Illinois, and further tends to show that the original construction of the building had been altered and increased from six (6) to twenty-two (22) dwelling units."

Appellee's Housing Code, which is part of appellee's building code, was passed June 20, 1956, and became effective January 1, 1957. It applies specifically to buildings devoted to "residential purposes" and was designed to bring all such buildings into compliance with minimal sanitary, fire and safety requirements of appellee's building code (Jurisdictional Statement, p. 27a, section 78-11.1).

Appellee's Housing Code does not prohibit the residential use of a building. It only attempts to have such build-

ing comply with said code in order that the occupants thereof shall have the minimal sanitary, fire and safety protection to which they are entitled and which minimal requirements appellee has the duty to require.

Appellants cite *Dobbins* v. *Los Angeles*, 195 U. S. 223 (Jurisdictional Statement, p. 11), as being applicable herein. Such case is not in point. It did not involve a building code requiring minimal sanitary, fire and safety protection but was in the nature of a zoning ordinance prohibiting a gas works within a certain district.

Appellants practically base their constitutional argument on *Brennan* v. *City of Milwaukee*, 265 Wis. 56 (Jurisdictional Statement, p. 8).

Both the trial courts opinion (Jurisdictional Statement, p. 12a) and the Supreme Court of Illinois opinion (Jurisdictional Statement, p. 20a), show that such opinion is erroneous and contrary to the general rule relative to legislative classification.

Appellants do not contend that appellee's building code is not an exercise of appellee's police power. The exercise of such police power has always been looked upon liberally by this court.

In *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80 (1946), this court upheld a statute of the State of New York which provided that existing buildings had to install certain new fire prevention equipment. It was there claimed that the building in question had a market value of about $25,000 and that the cost of complying with the statute would be about $7,000. [Note: In the case at bar, although appellants did not put in any evidence to show how much it would cost them to bring their building in compliance with the minimal sanitary, fire and safety requirements of appellee's building code, they claim (Jurisdictional Statement, p. 11). "It is common knowledge that rebuild-

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ing of walls and partitions of an established structure requires a major change and involves great expenditure. To require the owner of an established building to rebuild it in accordance with subsequent enactments involves the deprivation of a property right, in violation of 'due process of law.' "]

In answer to the contention in the *Queenside* case and appellants' similar contention herein, this court said (328 U. S. at 82):

> "Little need be said on the due process question. We are not concerned with the wisdom of this Legislation or the need for it. [Citation.] Protection of the safety of persons is one of the traditional uses of the police power of the State. Experts may differ as to the most appropriate way of dealing with fire hazards in lodging houses. Appellant, indeed, says that its building, far from being a fire-trap, is largely fireproof; and to the extent that any fire hazards exist, they are adequately safeguarded by a fire alarm system, constant watchman service, and other safety arrangements. But the legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to a minimum. . . . *But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws.*" (Emphasis added.)

In *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590 (1962), the Town of Hempstead enacted an ordinance regulating dredging and pit excavating on property within its limits. Such ordinance prevented excavating below the water table and the enclosure of such excavation. It was claimed that the ordinance prohibited a beneficial use to which the property had previously been devoted and resulted in a depriva-

tion of property for public use without just compensation therefor. This court, held (p. 593):

> ". . . A prohibition simply upon the use of property for purposes that are declared by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."

Appellants' building was constructed in 1899 (Jurisdictional Statement, p. 5). The entire purpose of appellee's building code and the statute of Illinois which enabled appellee to bring this action for a mandatory injunction, is to compel owners of such sub-standard buildings as appellants, to bring their buildings within the minimal sanitary, fire and safety requirements of today's living conditions, to the end that people living in such buildings, will have the same health and safety protection enjoyed by people living in standard buildings.

There can be no better or higher exercise of the police power than that exercised by appellee herein in order to bring about fit living conditions for the public residing in buildings devoted to residential use.

Such exercise of the police power does not violate any constitutional guarantees. It guarantees that the public have safe, healthful places to live.

The opinion of the trial court (Jurisdictional Statement, p. 12a), sums up the issue herein quite well. It states:

> "The passage and enforcement of these provisions of the Municipal Code insofar as they effect the health and safety and promote health and suppress disease are desirable and serve public policy and the welfare of the citizens. Any steps to nullify police powers under regulations similar to those before this Court under the proofs made in the face of no proofs to controvert same would have a severe consequence and without exceptions should not be entertained."

Appellee respectfully submits that the appellants present no substantial question for the decision of this court and prays that its motion to dismiss the appeal be allowed.

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